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RELIEF FOR THE FEDERAL JUDICIARY.

One important measure of relief for which the bar has been striving for many years has been secured.

The bill providing for an increase in the salaries of federal judges, which passed both Houses of Congress over a month ago in slightly different form, has been agreed upon in conference and signed by the President.

The United States District judges, including the judges in Porto Rico, Hawaii and Alaska, exercising federal jurisdiction, receive a salary of $7500 per annum. Circuit judges now receive $8500 per annum.

An important feature of this new law is the amendment to Section 260 of the Judicial Code by which authority is given to the President to retire any federal judge who, having served ten years and reached the age of 70 years, refuses to resign or retire on full pay. The method by which this is accomplished is by the appointment of an "additional circuit or district judge." The "disabled" judge," according to the statute, shall then "be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority." After the death of the judge so resigning or forcibly retiring, it is provided that the vacancy occurring by reason of such death shall not be filled. Thus, by a roundabout way, Congress has succeeded in solving a difficult situation.

The wide extension of federal jurisdiction under the war powers makes these reforms more important than they ever were before. The war is over, but the problems of taxation and demobilization will prevent the federal government from releasing its extraordinary grip on the social and business life of the country for some time to come.

CHIEF JUSTICE CLARK AND THE JUDICIAL VETO.

Chief Justice Clark of North Carolina, has been kind enough to send us copies of two of his recent addresses which are replete with beautifully turned phrases and apt references to classical literature. But Justice Clark is still riding his hobby—"opposition to the judicial veto," as he calls it—and overlooks no opportunity to spread dissatisfaction with the courts by charging them with "usurpation" in their assertion of the right to hold acts of Congress or of the legislature unconstitutional and void. His latest argument, delivered in a recent address (January 31, 1919) to the Law Class of the University of North Carolina, contains an extravagant analogy of a kind which Justice Clark is so fond of using. He said:

"At Rome, the privileged classes when afraid to directly oppose measures in the popular interest had resort to the system of Augurs. When an assembly was about to be held in the *Campus Martius* at which the vote was likely to be hostile, these augurs, always selected by the patricians, would adjourn the meeting upon the ground that the augurs declared it was not an 'auspicious' day, or that the sacred chickens kept by the priests were off their feed, or the entrails of the sacrificial victim showed that it was unsafe to proceed, or that the flight of birds betokened danger, or some other similar device was resorted to. Cicero said that he did not see how an augur could pass another without laughing in his face. These devices of statecraft used by the Romans to control the masses in the interest of the classes without a conflict are in nowise superior to the action of the judicial augurs who always find any act of Congress or of

a State Legislature 'unconstitutional' if it conflicts with their preconceived opinions. The judicial veto must exist 'by divine right,' like that claimed by kings of old, for it has no visible authority and rests upon the 'imperturbable perpendicularity of assertion' only."

If this analogy is not merely a play on words, it is a monstrous libel on the great judges who labored so zealously and so effectively to guard the Constitution, that greatest of documents "ever struck off at a given moment by the brain and purpose of man." These men undertook with unquestionable sincerity to guide the feet of the new republic through difficulties and around pitfalls which it was the purpose of the framers of the Constitution to avoid. To charge that Marshall, Story, Chase, Field, Miller, Taney and others of the great and good men who sat on the Supreme Bench were guilty of practicing sophistical arts of chicane and augury in order to keep some privileged class in power in this country is not to cast any reflection upon the character of these men themselves, but upon the intelligence and gullibility of the people whose approval of and acquiescence in the results of the labors of these great judges is the best proof possible that the court was right in the interpretation of its power to uphold the constitution in the respect mentioned.

It is difficult to imagine what would have become of the Constitution if one like Justice Clark had "assumed" to fill the place occupied by Marshall during the early days of the Republic and had deliberately ignored the Constitution which he had sworn to support whenever it became his duty as a judge to enforce an act of Congress, which to his mind, clearly violated some provision of that instrument. The *reductio ad absurdum* of Justice Clark's argument is that, if Congress is the sole judge of the constitutionality of any law it proposes to adopt, then the power of amending the Constitution resides in Congress and not in the legislatures of the several states.

NOTES OF IMPORTANT DECISIONS.

WHEN MONEY WHICH IS STOLEN PASSES BY CHECK IS THE RECIPIENT LIABLE FOR RECEIVING STOLEN PROPERTY?—The law which always starts out with a simple understandable proposition not infrequently becomes complex and confusing when new, and often totally irrelevant conditions intervene. The only safe thing for courts and lawyers to do in such cases is to go back to first principles and discover not the letter of the rule but the spirit of it; not the application of some "all fours" feature of case or statute, but the fundamental concept or purposes therein involved. If this were done courts would not make the sad mistake which we believe the Appellate Division of the Supreme Court of New York made in the recent case of People v. John J. Hanley (Feb. 24, 1919).

The case is an interesting episode in crime. Briefly, Foye, a $75 a week clerk working for a trust company in New York conceived the idea of getting a big "loan" on some blank certificates of the General Electric Company which were in his control. Through Brown & Co., in Philadelphia, Foye arranged to borrow $10,000 on a certificate of 100 shares of stock, which Foye forged for the purpose. The money was sent by draft by Brown's bank in Philadelphia to a correspondent bank in New York with instructions to turn it over to a trust company in which Foye had opened a special account for these funds. Subsequently Foye forged ten other certificates of the General Electric Company on which he obtained about $100,000 in cash. Of this amount Foye drew out $21,000 in cash and gave to the relator, a Mrs. Briggs, who was acquainted with Foye's scheme and who had intended to elope with him to California. Later Foye was convicted of forgery by a Philadelphia court. Mrs. Briggs was then arrested by the New York authorities and charged with the crime of receiving stolen property. On defendant's petition for release on habeas corpus the lower court granted the writ on the ground that the actual money stolen was not received by Mrs. Briggs. This decision the Appellate Division has sustained by a divided court.

In the early days when the crime of receiving stolen property was first defined the intricate bookkeeping arrangements of modern

banking transactions were not in mind. If A stole $10,000 and gave it or part of it to B, the latter was liable for receiving stolen property, if he knew the manner by which it was obtained.

Now the court in this case admits (1) that Foye stole the money; (2) that Mrs. Briggs knew that the money had been stolen. These are all the elements of the crime of receiving stolen property. The court, however, declares that the second requisite is not fulfilled unless the $21,000 which Mrs. Briggs received was the actual money of Brown & Co. which Foye received by larcenous means. But Brown & Co. parted with no cash. They gave a check for the amount of Foye's loan to their bank, who telegraphed a credit to the Seaboard Bank of New York, who drew a draft in favor of the Knickerbocker Trust Co. "to the use of Foye." This is sort of a House that Jack Built transaction. No cash passed in the transaction until Foye drew a check and received the currency which h turned over to Mrs. Briggs. This was to all intents and purposes the "actual money" which Foye stole from Brown & Co. The dissenting opinion of Justice Shearn is so clear and convincing in its logic that we give it here in lieu of further comment of our own. The learned judge said:

"It cannot be doubted, as it seems to me, that the money received by Foye and turned over to the relator was stolen money. As this stolen money is unerringly traced from Brown & Company, the owner, to Foye, the thief, and as there are involved no equities of third persons, no claims of the trust company or of any other persons acting in good faith, it seems to me unduly technical to contend that the money thus obtained by Foye and turned over to the relator was not the identical money that Brown & Company parted with. I should be of the same opinion even if Foye had stolen currency out of the till of Brown & Company, deposited an account opened for the purpose containing nothing but the stolen money, and had thereafter drawn the money out on check and turned it over to a receiver. The operation of depositing the money for a few minutes in a bank, and then drawing it out again could work no immunity to the person receiving the money with full knowledge of the transaction. Still less should any such claim be supported in a case like this, where the defrauded party has been led to make a deposit for the account of the thief and the latter's first actual possession of the money is when the bank of deposit honors his check upon it."

DOES THE RIGHT TO EXCLUSIVE SALE GIVEN TO AN AGENT EXCLUDE SALE BY PRINCIPAL?—A glance at the reports indicates that it does not seem to occur to real estate agents and their counsel that a contract for exclusive sale or agency for the sale of property does not prevent the owner from selling the property unless the contract amounts to an option. This is clearly brought out by the Supreme Court of Wisconsin in Roberts v. Harrington, 169 N. W. 603, where it was held that a contract for the "exclusive sale" of property within a definite period of time did not prevent the owner from selling the property before the time arrived.

This case is stronger than the usual cases involving this question which have held that a contract for the "exclusive agency to sell" property did not to prevent the owner from selling the property himself. Kimball v. Hayes, 199 Mass. 516. Some of the recent decisions have declared, *arguendo*, that the right of "exclusive sale" was to be distinguished from the right of "exclusive agency to sell," on the ground that the latter only prevented the principal from giving the property to another agent. But the actual decisions in these cases do not support the distinction. Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606; Dole v. Sherwood, 41 Minn. 535. In Ingold v. Symonds, 125 Iowa 82, 99 N. W. 713, a contract giving a broker "exclusive authority to procure a purchaser" within a definite time was construed not to prevent the owner from selling. The court declared that "the right of an owner to sell his own property is an implied condition of every contract of agency, and unless expressly negatived, will prevail."

The unilateral character of contracts to sell property is not always kept in mind by attorneys in passing on situations like those arising in the principal case. A unilateral contract is nothing more nor less than a *continuing* offer. Ordinarily an offer must be accepted promptly or in a reasonable time or no contract results. A continuing offer is one which by its terms is held to be open to acceptance for a specified or indefinite time. If A tells B that he will sell him Whiteacre for $1000 and gives B ninety days to accept his offer, B can signify his acceptance on the 89th day and a contract results, provided that A has not definitely withdrawn his offer in the meantime.

But there is no obligation resting on the one who makes such an offer to keep it open for the time agree upon. Coleman v. Applegarth, 68 Md. 21. If B wishes to have A's offer kept open for ninety days he must make a supplementary agreement with A founded upon a valuable consideration that A will keep his offer open for ninety days. This is called an option and should be kept distinct in the mind from the continuing offer itself.

Applying this reasoning to an agreement by which A offers to give B the exclusive agency for the sale of his property for sixty days, B has the right at any time within sixty days to bring in a purchaser willing to comply with A's terms and the unilateral contract (or continuing offer) becomes a bilateral contract and A is bound to sell and is liable to pay B his commission. But if before B finds a purchaser, A sells the property, such sale is a revocation of such offer and B has no further right to accept the offer and is not entitled to any commissions. Stensgaard v. Smith, 43 Minn. 11. The agent in this case as the vendee in the other case given, could enter into a supplementary agreement with the owner to hold open his offer to give the agent the exclusive right of sale and, if founded on a valuable consideration, would bind A to hold open his offer. Fairchild v. Rogers, 32 Minn. 269.

One of the debatable questions in reference to the law applicable to unilateral contracts is what effect the expenditure of time and money in the attempted performance of the undertaking has upon the obligation of the offerer to keep his offer open. Thus, suppose a real estate agent who is given the exclusive sale of property, spends money in advertising the property and gives time to the solicitation of prospects, can the offer be then arbitrarily withdrawn? Logically there is no escape from the conclusion that the offerer is not bound even in such cases to keep his offer open and it was distinctly so held in the Stensgaard case. The law on these cases was established by the leading English case of Dickenson v. Dodds, 2 Ch. D. 463, where it was held that an offer to sell real estate may be withdrawn before acceptance by prior sale, knowledge of which came to the offeree before acceptance. See learned discussion of this case in Langdell, Contracts, Sec. 181, and Williston's, Wald's Pollock on Contracts, p. 32.

LEGISLATIVE REVISING EDITORS.

In this age of innovation, and many changes of the set rules of action, there are some discussions of the best means of lessening the number of reported cases, and diminishing the number of ever increasing volumes of reports.

The great number of reports of cases which are being issued annually is a problem which confronts the legal profession, and is one that cannot be brushed aside without consideration.

A large per cent of the reported cases disclose an effort on the part of the court to reach the coveted goal of "Legislative intent" in the construction of some legislative enactment. Of course the aim of the court is to ascertain what the legislative intent was, of the body enacting the law, from the language employed in the particular instance. When that result is accomplished, in so far as that case or statute is concerned, the courts' labors are at an end.[1] Many hours of good and valuable time of judges, and much good judicial energy is expended in what might be termed a vain effort to ascertain the "Legislative Intent" from the particular language employed.

Society generally, and the legal profession in particular, are familiar with the personnel of the Legislative Bodies in the different states. They are usually composed of men who are not in any measure versed in law or legal phraseology. Indeed we might say in many instances there are members of the state legislatures in all states who are absolutely illiterate. These very members of the law making bodies draft many bills which are enacted into law. Until courts have revised some of such acts, and breathed into them vitality and clearness of expression, by construction, the profession and inferior courts are groping in utter darkness, chaos, in

(1) 36 Cyc. 106 N. 29.

search of the "legislative intent" as expressed by some of the acts. It may well be said that numberless fruitless searches are annually made through the labyrinths of the temple of uncertainty for the "legislative intent." For example, what would an attorney advise a client as to the "legislative intent" having for consideration the following code provision of the states of Idaho and California, to-wit:

"When an attorney dies, or is removed or suspended or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party by written notice to appoint another attorney or appear in person."[2]

This act has not been construed or judicially interpreted by the courts, but it has been slightly touched upon by the Supreme Court of California.[3] In that case the court dealt cautiously with its provisions, and did not enter upon an extended discussion of the correct construction. To say the least of it, this is a clumsy piece of legislation, and it would seem that the adverse party is required to ascertain the death, removal, or other disability of the opposite counsel, and then look up his adversary, and advise him he is without an attorney.

To further illustrate, another section of the same codes will be cited, to-wit:

"A subsequent marriage entered into by any person during the life of a former husband or wife of such person with any person other than such former husband or wife, is illegal and void from the beginning, unless: (1) The former marriage of either party has been annulled or dissolved more than six months, or (2) such former husband or wife was absent and not known to such person to be living for a space of five successive years immediately preceding or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted, in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."[4]

Many such statutes as ambiguous as these could be cited in all states. This last cited section of these codes has not been construed in either state. This act says in the beginning that such marriages are void from the beginning, and not voidable. To say the marriage is void, is equal to saying that there is no marriage. Yet the same section further provides such subsequent marriage is valid until its invalidity or nullity is adjudicated, etc. How can a marriage be void and valid at one and the same time?

It is very probable, however, that the latter provision would control, and that the marriage would be valid until adjudicated otherwise, under the well-known rule of construction holding in cases of conflicting provisions of statutes, the latter shall govern.[5] But then what would the court say as to the issue born in the interim between the date of the alleged marriage, and the date of its adjudication as a nullity? The act says they shall be void from the beginning, and the act also says they shall be valid until adjudged and decreed invalid.

This is an evil or possibly a defect in our legislative system which could be remedied without the inauguration of any radical changes in the law making plan. Why not have a board of "Legislative Revising Editors?" Let this board be composed of say three or more members, all of whom should be lawyers with training and ability adapted to that particular line of work. Make it a condition precedent to the introduction of a bill that same shall have passed through the hands of the "Legislative Revising Editors" and there correct any defects or inaccuracies of expression and provision found in it so as to lucidly express the intent of the law

(2) Cal. Civ. Code Pro. 286.
Ida. Rev. Codes 4001.
(3) Nicol vs. San Francisco, 130 Cal. 288, 62 Pac. 513.
(4) Ida Rev. Codes 2617
Cal. Civ. Code 61.
(5) 36 Cyc. 1130.

makers. The "Legislative Revising Editors" would have ample opportunity to confer with the backers of the bill, and ascertain its intent and purposes.

It is thought this plan would expedite legislation and facilitate litigation when the act is called in question, as well as prevent litigation. The illative result would be a great saving in the time of courts and money to the commonwealth.

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RIGHTS AND DUTIES OF OCCUPANT OF AUTOMOBILE OTHER THAN DRIVER.

Not chargeable with negligence of driver. —It is the law in nearly all of the states that an occupant of an automobile, who has no right of control over the driver, and exercises no control over him, is not chargeable with the negligence of such driver.[1]

The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated.[2]

In the application of this rule the Michigan and Wisconsin courts draw a distinction between a guest and one who is a passenger for hire, that is, one who is technically a passenger. These courts apply the rule stated in favor of the passenger, but not as to the guest. Thus, in a Wisconsin case,[3] the rule was reiterated that "the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, will defeat the action."

In Michigan the Supreme Court has said that, "It seems now to be settled, in this state at least, that, where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one upon whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other."[4]

But the Michigan court takes the opposite view in the case of one riding in an automobile as a guest of the driver.[5]

Some courts have held that the general rule here stated is only applicable where the occupant is seated away from the driver, and is without opportunity to discover danger and to inform the driver of it.[6] This, however, has no bearing on the dule or its application. It merely has reference to the conduct of the occupant, which is a question entirely distinct from the one under consideration. It is discussed hereafter in this article.

In all cases, other than those in which the relation of master and servant exercises a controlling influence, in which the courts have attempted to create exceptions to the rule stated, it will be found that the negligence with which the occupant was charged was his own, and not that of the driver. It is negligence on the part of an occupant to ride in a recklessly driven machine without doing what he reasonably can to cause it to be properly driven. So, it is negligence if he observes an impending danger and fails to warn the driver, who, oblivious thereof, is carelessly incurring the same. But this is not imputed

(1) The cases on this point are too numerous to cite; they may be found in Berry, Automobiles (2nd ed.), sec. 318, note 1.

(2) Corley v. Atchison, T. & S. F. R. Co., 90 Kan. 70.

(3) Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 17 Am. Neg. Rep. 268, 13 N. C. C. A. 912.

(4) Galloway v. Detroit United Ry., 168 Mich. 343.

(5) Kneeshaw v. Detroit United Ry., 169 Mich. 697; Granger v. Farrant, 179 Mich. 19.

(6) Davis v. Chicago, R. I. & P. R. Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; Brickell v. New York Cent. & H. R. R. Co., 120 N. Y. 290, 17 Am. St. Rep. 648.

negligence; it is negligence of the occupant, first hand.

The only principle upon which an occupant of an automobile is chargeable with the negligence of the driver, is that the driver is the agent or servant of the occupant,[7] or that they are engaged in a common or joint enterprise.

Members of same family.—The fact that the occupant and driver of an automobile are closely related and members of the same family, does not affect the rule that the driver's negligence is not imputable to the occupant. Thus, the negligence of a husband, who is driving, is not imputable to his wife, who is riding with him;[8] nor the negligence of a parent to his child, whether the latter be an adult or minor;[9] nor that of a brother to a brother or sister.[10]

Anyone riding with a driver has the right to some extent to rely upon him to exercise care for the safety of all in the vehicle. By this such person does not make the driver his servant, nor is he on that account to be held for the driver's negligence. It is a matter of every-day occurrence in every part of the country for persons of ordinary prudence to rely greatly upon the person in control of the vehicle. What all men do may certainly be taken as the standard of ordinary care.

"Common sense would dictate that when a wife goes riding with her children in a rig driven by her husband she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her, under the circumstances, to impugn her husband's ability to drive and assume the prerogative to dictate to him the manner of driving."[11]

The negligence of a master's servant cannot be imputed to the master's wife.[12]

Machine under control of occupant.—If the occupant has the right of control over the operation of the automobile and permits it to be negligently driven, he is chargeable with his negligent failure to exercise his right to require the driver to properly operate the car.[13]

In a case in which it appeared that a police officer was injured while riding in an automobile driven at excessive speed, the court, said: "But he was a policeman wearing a star as such and carrying a revolver and, though off his assigned beat, was still clothed with the authority of enforcing the law. He was endowed with the same authority as marshals in making arrests, and the latter are empowered to make these in order to diligently enforce all laws for the preservation of the public welfare and good order. Though the operator was driving at a speed in excess of that limited by statute, plaintiff interposed no objection or protest whatever, though presumably he might have required him to slow his car down to ten miles an hour. Had he done so, no argument is required to demonstrate that the accident would not have occurred. As he was in a position of authority and might have determined the speed of the car, he is not in a situation, because of being a guest, to evade responsibility for the rate at which it was being driven. His position is akin to that of a person other than the driver taking no heed of the danger ahead."[14]

(7) United Rys. & El. Co. v. Crain, 123 Md. 332.

(8) Gaffney v. Dixon, 157 Ill. App. 589; Fisher v. Elliston, Ia., 1916, 156 N. W. 422; Denton v. Railroad, Kan., 1916, 155 Pac. 812; Kobesh v. Price, 136 Minn. 304, 161 N. W. 715; Virginia R. & P. Co. v. Gorsuch, Va., 91 S. E. 632.

(9) Henry v. Epstein, 53 Ind. App. 265.

(10) Parmenter v. McDougall, Cal., 1916, 156 Pac. 460.

(11) Williams v. Withington, 88 Kan. 809, 813.

(12) Moon v. St. Louis Transit Co., 237 Mo. 425.

(13) Bryant v. Pacific El. R. Co., Cal., 164 Pac. 385.

(14) Hubbard v. Bartholomew, 163 Ia. 58. See also, Klinczyk v. Lehigh Valley R. Co., 152 App. Div. (N. Y.) 270, which was a case involving a collision with a train, and in which it was held that if the passenger had the more convenient view of the approaching train and was superior

Common enterprise.—Where two or more persons with a common purpose jointly undertake to do a thing, each is considered to be acting for the others, and the negligence of each is attributable to the others. As an essential element in the relation of master and servant is lacking—that of control of details—the only theory on which the rule can be based is that the performance of the plans which all have agreed upon is as personal to one as to another—a sort of partnership, as it were. In order that the rule may apply, it is said that each must have an equal right of control, and that the negligence complained of must be in respect of a matter within the joint enterprise.[15]

To establish a joint undertaking between the driver and an occupant it is not sufficient merely that the latter determine the destination or route; he must have some control.[16]

Where two friends, one of whom owned an automobile, went in the machine on a pleasure trip, in which they were both interested, the one who did not own the car getting it ready for the trip, they were engaged in a joint enterprise.[17]

It appeared in one case that the plaintiff had employed her family physician to go with her to bring her mother, who was ill, to her home. The doctor procured the use of his son's automobile for the trip, and the automobile was driven by his daughter. All rode together, and when they reached their destination they found that the mother had died, and their errand was fruitless. On the return trip the automobile broke down, and, after some delay, the doctor hired the driver of a passing auto truck to take them in tow. While so proceeding, their machine was struck by a street car, and the plaintiff was injured. The court held that there was a question for the jury whether or not all three were engaged in a common enterprise, so that the hiring of the truck driver by the doctor was a hiring by the plaintiff, making the truck driver her servant, whose negligence was imputable to her. In this respect the court said:

"We think the inference might fairly have been drawn from the testimony that the parties were all engaged in a common enterprise, in which the plaintiff was quite as much interested as was her physician, who was undoubtedly making the trip for her benefit and at her request. When he employed the driver of the auto truck to take them in tow, it was in furtherance of the common purpose. At least the jury would have been warranted in finding that to be the fact. We see no room for any distinction between any of the occupants of the automobile. They were at the time being drawn by the auto truck, whose driver had been employed to take the whole party to their destination. The extent of the control which they, or any of them, could or should have exercised over the driver was a question of fact for the jury."[18]

The mere fact that one person accepts the invitation of another to ride, does not place them within the rule relative to persons engaged in a common or joint enterprise.[19]

Care required of occupant.—The common obligation of mankind for their own preservation is to exercise reasonable care. An occupant of an automobile forms no exception to this rule, and is required to take such precautions for his safety that one of ordinary prudence would take in similar circumstances. It is no less his duty, when he has the opportunity, than it is of the driver, to discover and avoid danger.[20] And if he voluntarily goes into a patent danger

in authority to the driver, so that he could have ordered him to stop, he may be charged with contributory negligence.

(15) Corley v. Atchison, T. & S. F. R. Co., 90 Kan. 70.

(16) Bryant v. Pacific El. R. Co., Cal., 164 Pac. 385.

(17) Washington & O. D. Ry. v. Zell's Adm'r, Va., 1916, 88 S. E. 309.

(18) McLaughlin v. Pittsburgh Rys. Co., Pa., 1916, 97 Atl. 107.

(19) Beard v. Klusmeier, 158 Ky. 153; Corley v. Atchison, T. & S. F. Co., 90 Kan. 70.

(20) Campbell v. Walker, 2 Boyce (Del.) 41; White v. Portland G. & C. Co., 84 Oreg. 643, 165 Pac. 1005.

that he could reasonably avoid, he cannot recover for resulting injuries.[21]

Whether or not an occupant exercised due care for her safety by remaining in a disabled automobile while it was being towed by a rope through the traffic of a public highway, and in committing herself to the care of a strange driver, with whom, on account of the length of the rope and the noise made by the machine, it was difficult to communicate, was held to be a jury question.[22]

Where one voluntarily rode as a guest in an automobile on a dark night, without lights, over roads with which neither driver nor any of the persons with him was familiar, with full knowledge of the facts, he was held to be as guilty of negligence as the driver.[23]

On the other hand where one, unacquainted with the operation or management of an automobile, is riding with one whom he knows to be an experienced chauffeur, there being no mutuality in a common enterprise between them, he may place a certain degree of confidence in the skill and experience of the chauffeur. Thus, where it appeared that plaintiff's intestate, who was sixteen years of age, was riding in an automobile at the invitation of the operator; that he had never ridden in an automobile before; that he was entirely unfamiliar with the vehicle, and that he knew he was riding with an older person whom he knew was familiar with its operation and fully able to manage and control it, it was held that the jury were justified in finding that the intestate was not negligent when the automobile was struck by a train under circumstances which rendered the operator guilty of contributory negligence.[24]

In this respect, the court in one case said: "In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety.[25]

So, in approaching a railroad crossing a passenger need not look and listen for an approaching train with the same care required of the operator.[26]

However, the vigilance of one passenger will not relieve a fellow-passenger from the duty of exercising due care to avoid injury.[27]

If the occupant sees or hears anything indicating danger that the driver cannot or probably does not see or hear, it is his duty to tell the driver. But it is not incumbent upon him to tell the driver of the approach of every street car or other vehicle, or of every defect in the highway, which is as manifest to the driver as to the occupant.[28]

An occupant of a vehicle is not expected ordinarily to give advice or direction as to its control or management. To do so might

(21) Trumbower v. Lehigh Valley Tr. Co., 235 Pa. 397.

(22) McLaughlin v. Pittsburgh Rys. Co., Pa., 1916, 97 Atl. 107.

(23) Rebillard v. Minneapolis, St. P. & S. S. M. R. Co., 216 Fed. 503.

(24) Sherwood v. New York Cent. & H. R. R. Co., 120 App. Div. (N. Y.) 639.

(25) Carnegie v. Great Northern R. Co., 128 Minn. 14.

(26) Thomas v. Illinois Central R. Co., Ia., 1915, 151 N. W. 387.

(27) Wiwirowski v. Railroad Co., 124 N. Y. 420, 424.

(28) Toledo & O. C. Ry. v. Fippin, 32 Ohio Cir. Ct. Rep. 755, Aff'd 86 Ohio St. 334.

be harmful rather than helpful.[29] But in the circumstances of a particular occasion, it may be his duty to look out for threatened or possible dangers, and to warn the driver of such after their discovery.[30]

The degree of care which the occupant is required to exercise depends upon all the attendant circumstances.[31] The character of the vehicle, or his location in it, or other circumstances, may be such that to look or listen for aproaching cars, or other dangers, would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers, and entirely neglect to look out for dangers, or to observe the manner in which the vehicle is being operated, might be the conduct of a reasonably prudent person. Manifestly, the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it requires of the driver.[32].

Intoxicated or careless driver.—It may be incumbent upon a passenger or guest in the exercise of ordinary care to refuse to ride with a driver who is intoxicated or who is known to be negligent or incompetent.[33]

In a case in which it appeared that an intoxicated person was riding with an intoxicated driver, it was held that if he knew or would have known had he been sober that the driver was in such a state as to be incapable of giving attention to driving which a prudent man would have given, he could not recover for injuries caused partly by the driver's negligent conduct due to his intoxicated condition.[34]

Liability of operator to guest.—One who accepts an invitation to ride with another does not thereby relinquish the claim to protection from the operator of the machine. The duty of the operator to the occupant is to exercise reasonable care not to unreasonably expose the occupant to danger and injury by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel. Failing in this duty, he will be liable to the occupant or guest for injuries resulting from such carelessness or lack of diligence.[35]

"A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence. The obligation of one who invites another to ride is not as great as that of the owner of real property who invites another thereon, especially for the purpose of trade or commerce, because, under such circumstances, the one who gives the invitation is bound to exercise ordinary care to keep such property reasonably safe. Under the above principle, therefore, one who invites another to ride is not bound to furnish a sound vehicle or a safe horse. If he should have knowledge that the vehicle was unfit for transportation or the horse unsafe to drive, another element would arise, and he might be liable for recklessly inducing another to enter upon danger."[36]

The plaintiff was invited by defendant to ride in his automobile, and while so riding, and when another automobile attempted to pass them, the defendant increased his speed and participated in a race with the other machine. Plaintiff begged defendant to be allowed to get out, but her request went unheeded. Defendant's machine collided with a pile of building material in the street, and plaintiff was injured. It was held that she could recover.[37]

C. P. BERRY.

St. Louis, Mo.

(29) Clarke v. Connecticut Co., 83 Conn. 219; Wilson v. Puget Sound El. Ry., 52 Wash. 522.
(30) Clarke v. Connecticut Co., 83 Conn. 219.
(31) Warth v. Jackson County Court, 71 W. Va. 184.
(32) Clarke v. Connecticut Co., 83 Conn. 219.
(33) Thompson v. Los Angeles & S. D. B. R. Co., 165 Cal. 748; Lynn v. Goodwin, 170 Cal. 112.
(34) Cunningham v. Erie R. Co., 137 App. Div. (N. Y.) 506.
(35) Perkins v. Galloway, Ala., 69 So. 875.
(36) Patnode v. Foote, 153 App. Div. (N. Y.) 494.
(37) Beard v. Klusmeier, 158 Ky. 153.

SALES—FOOD FOR CONSUMPTION.

HEINEMANN v. BARFIELD.

Supreme Court of Arkansas. Oct. 28, 1918.

207 Southwestern Reporter 62.

Where flour was sold by retail dealer to consumer for immediate use, there was implied warranty flour was fit for food, and, where it contained arsenic, which, when served in bread by his wife, poisoned the purchaser, the dealer was liable to his estate as for breach of warranty.

WOOD, J. This was a suit by Pattie Barfield, as administratrix of the estate of R. H. Barfield, deceased, for the benefit of herself, as widow, and Lusky Barfield, the next of kin, of R. H. Barfield. The complaint alleged that she had been duly appointed administratrix of the estate of R. H. Barfield; that she was the widow of R. H. Barfield, and that Lusky Barfield was their minor child; that R. H. Barfield, her husband, was made sick and afterwards died from the effects of poison caused by eating bread made from the flour which was sold to him by the appellant. The complaint alleged:

That the suffering and death of R. H. Barfield "was caused by said wrongful act of the defendant in selling for use as human food said flour, which was impure and unwholesome and contained poison as hereinbefore set out, and of the presence of which poison the defendant knew, or should have known in the exercise of that care required of him by law."

The complaint as to the charge of negligence was the same as that in the case of S. Heinemann v. Pattie Barfield, 207 S. W. 58. Other allegations were as to R. H. Barfield's sickness, suffering, and death. There was an allegation that the deceased contributed to the support of said widow and child, and by his death they have been deprived of his companionship and care and of his support. There was a prayer for damages for the benefit of the estate in the sum of $10,000, and also for the benefit of the widow and child in the sum of $10,000.

There was a motion to make the complaint more specific and a demurrer to the complaint, both of which were overruled. The answer denied the material allegations of the complaint except as to the representative capacity of the plaintiff. The facts on the issue of negligence are the same as those developed by the evidence in the case of S. Heinemann vs. Pattie Barfield, and the instructions are the same, except that in the instant case the court authorized the jury, in case they found for the plaintiff, to return a verdict in separate amounts for the benefit of the estate of the deceased, R. H. Barfield, and also for the benefit of his widow and next of kin. The jury returned a verdict for the benefit of the estate in the sum of $2,000 and for the benefit of the widow and next of kin in the sum of $3,000, and from a judgment rendered according to the verdict is this appeal.

The ruling of the court was correct in overruling the motion to make the complaint more specific and the demurrer to the complaint. The complaint states a cause of action, as was held in the case of S. Heinemann v. Pattie Barfield. The facts on the issue of negligence and the instructions to the jury on that issue were the same as those in the case of Heinemann v. Pattie Barfield, and this case is ruled by that on the issue of negligence.

The judgment in favor of the appellee for the benefit of the estate of R. H. Barfield is right, and should be affirmed, for the further reason that there was testimony from which the jury might have found that the sale was made to R. H. Barfield, and, such being the case, his representative for the benefit of the estate would be entitled under the pleadings and proof to a judgment based upon the doctrine of implied warranty.

In Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210, it is said:

"In an ordinary sale of goods the rule of caveat emptor applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased."

This doctrine was approved in Nelson v. Armour Packing Co., 76 Ark. 352, 355, 90 S. W. 288, 289 (6 Ann. Cas. 237), where Judge Battle, speaking for the court, said:

"In the sale of provisions by one dealer to another in the course of general commercial transactions the maxim caveat emptor applies, and there is no implied warranty or representation of quality or fitness; but, when articles of human food are sold to the consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food."

See also, National Cotton Oil Co. v. Young, 74 Ark. 144, 85 S. W. 92, 109 Am. St. Rep. 71, 4 Ann. Cas. 1123; Doyle v. Fuerst & Kraemer, 129 La. 838, 56 South. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110; Elliott on Contracts, § 129; 15 Am. & Eng. Ency. of Law (2d Ed.), 1238; 11 R. C. L. 1119; Mechem on Sales, § 1356; 35 Cyc. 407; Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931, L. R. A. 1917B, 1272; Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. See, also, note to McQuaid v. Ross, 22 L. R. A. 187-195, and cases in note to Farrell v. Manhattan Market Co., 15 L. R A. (N. S.) 884.

There is no reversible error in the record, and the judgment is therefore affirmed.

NOTE.—*Caveat Emptor Not Applicable to Food Sold to Consumer.*—The question of the liability of anyone participating in the disposal of food for human consumption, either indirectly or directly, to a consumer, for its unfitness, has become of much interest in trade. A recent case decided by Second Circuit Court of Appeals affirms a ruling by a district court against a meat packer in favor of a domestic in the family of a purchaser from a retail dealer of diseased meat. Ketterer v. Armour Co., 160 C. C. A. 111, 247 Fed. 921, L. R. A. 1918 D, 798.

This case was heard by three of the ablest members of the Circuit Court: Ward, Rogers and Hough. C. J. J., and the unanimous opinion was handed down by Rogers, C. J. It plants itself upon the common law right of individuals to the enjoyment of life, health and reputation against all practices by others in the pursuit of their own ends, which naturally may endanger this right.

Discussing the rule of there being no implied warranty of the general fitness of anything sold simply as merchandise, the opinion shows that it has been held in many cases, that where food for human consumption is sold, there is a warranty that it is not dangerous to him who eats it. Thus in 1893 this was held in Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; in 1897 in Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; in 1905, in Salmon v. Libby, 219 Ill. 421, 76 N. E. 573, in 1914, in Parker v. Yost Pie Co., 93 Kan. 334, 144 Pac. 202, L. R. A. 1915 C, 179. 2 Cooley on Torts 3d Ed. 1489, points out that there is a public duty on anyone selling poisonous drugs and patent medicines containing ingredients calculated to produce injury and unwholesome food. This public duty leaps over all questions of warranty, express or implied, and does away with all refinement in this regard.

As to a drug, careless labeling, whereby a deadly poison goes to ultimate purchaser as a harmless medicine, gives the right to anyone misled to his injury the right of redress, whether he stood in contractual privity or not to any person responsible for the error. This was held as early as 1852 in Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

In 1889 in Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. R. 324, the proprietor of a patent medicine was held liable for injury to purchaser from a retailer using according to the prescription on the bottle placed thereon by the proprietor, this court spoke of secrecy in the formula from which the proprietor intended to derive profit and said he was liable "for all injuries sustained by anyone who takes the medicine in such quantities as may be prescribed by him." This goes further than holding that poison fraudulently labeled imposes liability on a tort feasor. It places a possibly innocent act on the same plane as a willful wrong.

In Weiser v. Holzman, 33 Wash. 87, 99 Am. St. R. 932, it was held in 1903, that delivering to another, for resale in ordinary trade, an article intrinsically dangerous to human life or health, without notice to any purchaser, remote or immediate, brings liability if without his fault injury ensues.

In 1908 Chancellor Pitney of New Jersey Court of Errors and Appeals, said that when a manufacturer of goods to be put on the market for sale to customers, goods for human consumption, and the consumer has no opportunity to gain knowledge of their quality, if they are unwholesome or unfit for consumption, and he relies on a representation of fitness arising out of the goods being offered for sale in such market, the manufacturer becomes liable for injury to a customer.

And further it was said that governmental inspection laws were not to be looked on at all as relieving a manufacturer or other wrongdoer from his general liability. Those laws were for governmental purposes only and if they work out additional safeguards, this is incidental only. O'Connor v. Armour Packing Co., 85 C. C. A. 459, 158 Fed. 241, 15 L. R. A. (N. S.) 812, 14 Am. Cas. 66, decided in 1908; Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931, L. R. A. 1917 B, 1272, decided in 1915. In this last cited case, the court said: "The common law duty to sell only wholesome food still remains, and the burden of discharging this duty has not been shifted to government inspectors."

But the Ketterer case does hold that if a manufacturer of food resorts to all known means to discover poison in food, such as trichinal, and it is accepted by the trade as pure food, he ought not be held, because such an article could be regarded as a proper article in commerce. This seems proper, if there is to be any fair measure of things regarded as harmless in intercourse and trade. Guaranty of purity is only a guaranty within the legitimate bounds of human endeavor. No contracting party is to be held, where he acts in good faith, to the impossible. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF MEETING OF KANSAS BAR ASSOCIATION.

The thirty-sixth annual meeting of the Bar Association of the state of Kansas was held in Topeka, January 30-31, last. It was one

of the most successful meetings of the many that this association has enjoyed.

President W. E. Higgins of Lawrence, who is seeking health in Colorado, furnished an address which was read for him, entitled: "Some Problems of Speed and Certainty in Our Trial Courts." It was received with considerable favor by the lawyers present, and has had some attention from the newspapers.

The annual address was given by Hon. George T. Page, president of the American Bar Association, before a splendid audience in the Supreme Court room, on the night of the 30th. The title of the address was, "The American Bar Association," after the delivery of which Mr. Page was unanimously voted an honorary member of the Kansas State Bar Association.

There were seven other addresses, all very fine, and all timely.

The officers elected are:

President—Judge John C. Hogin of Belleville.

Vice-President—J. D. Houston, Wichita, Kan.

Secretary—D. A. Valentine, Clay Center.

Treasurer—J. G. Slonecker, Topeka.

The executive council was chosen, headed by B. S. Gaitskill of Girard. This council really runs the affairs of the association at all times when it is not in session.

The meeting closed with a banquet in the Masonic temple, attended by about two hundred of the lawyers of the state. It was a brilliant affair, and in net product somewhat ahead of the high standard of such affairs heretofore maintained.

BOOK REVIEW.

WIT, WISDOM AND PHILOSOPHY.

Once in a while a poet, a wit or a philosopher sometimes succeeds in getting upon the bench, but it is seldom that in one man all three get on the bench at the same time, yet that is what actually happened in Missouri, and the *rara avis* was none other than the Hon. Henry Lamm, former Chief Justice of Missouri and a member of the Supreme Court of that State from 1905 to 1916.

From the opinions of Justice Lamm, delivered during a period of twelve years, a devotee and admirer in another state, Mr. Fred C. Mullinix, of Jonesboro, Ark., has excerpted from Judge Lamm's opinions the wise sayings, the flashes of wit, the beautiful word pictures, and the snappy epigrams filled with the condensed good sense of the ages, and presents them to the reader, classified and indexed, ready for either use or pleasure.

We remember when we were in college and had time for rumination, how well we loved to read the Reflections and Table Talk of that transcendental dreamer and philosopher, Samuel T. Coleridge. We have had the same pleasure, and we might add, profit, in reading the bits of legal reflections which Mr. Mullinix has gleaned from the writings of Judge Lamm.

In this busy, work-a-day and matter-of-fact world, it is refreshing occasionally to get away for a few hours to let the mind have full rein and wander where it will through the great avenues of space and time, studying the experiences of all men of all ages. And it is safe enough to do this with Judge Lamm, for he is sane enough always to keep in touch with the realities of life.

Intellectual pleasure and refreshment are not the only advantages to be derived from reading such a book as this. There will be found here and there many a nugget of truth so clear and compact as to startle the mind by its brilliancy. The wise use of such epigrammatic forms of speech will often rouse the sluggish mind of some judge into a clear appreciation of one's argument.

Among some of the shorter excerpts from Judge Lamm's opinions found in the volume before us may be quoted, at random, the following:

"Sometimes an exclamation is as good as a disclosure."

"The law is more praised when it is consonant with reason."

"A fair test of the matter is to put the shoe on the other foot."

"If two opinions split the way, hear what conscience has to say."

"Where there is a will, there is not always a way—to break a will."

"Justice must not be sacrificed upon the sharp edge of technicality."

"A court should not decide what is not judicially presented before it."

"One of the inherent rights of every court is the right to change its mind."

"Law: A bundle of rules to make life more tolerable among civilized men."

"Plaintiffs go into court voluntarily; defendants are pulled in by the ears."

"This being a court of errors, we sit to correct our own as well as those of others."

"No argument against the use of a thing can be drawn from the abuse of a thing."

"While the dead tell no tales, neither can the dead defend themselves against tales."

"In the eye of the law no one can successfully build a superstructure of right upon his own wrong."

"Courts should not torture or twist a statute into a device for obtaining property under false pretenses."

"When fraud comes in at the door, all contrivances to consummate it fly out at the window in chancery."

"We take judicial notice that the need of money is an abiding infirmity, natural and common to all men."

"A judge should have two salts—the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be devilish."

"There is a pronounced line of demarcation between what is said in a legal opinion and what is decided by such opinion."

"If courts unsettle a rule of law, the door is opened wide for confusion to come in; certainty being the very essence of good law."

"The master voice of humanity cries out, and the law, an invention for the welfare of man, knows its master's voice and heeds it."

"No system of laws could for one minute command a whit of respect that would add to the delays of the law the intolerable burden of reversing judgments on every error whatsoever."

"It is the brightest jewel in the crown of the law to seek and maintain the golden mean between defamation, on one hand, and a healthy and robust right of free public discussion on the other."

"The beautiful character of pervading excelliency, if one may say so, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes."

Printed in one volume of 218 pages, limp binding, by the compiler, and for sale by the Central Law Journal Company.

BOOKS RECEIVED.

Hand Book on the Modern Law of Evidence. A Concise Statement of the Rules in Civil and Criminal Trials, Based Upon the Modern Law of Evidence by Charles Frederic Chamberlayne, Editor of American Edition of Best's Principles of the Law of Evidence, American Edition of Taylor on Evidence. Edited by Arthur W. Blakemore of the Boston Bar, Editor of Blakemore and Bancroft on Inheritance Taxes, etc., and Dewitt C. Moore, Author of "The Law of Carriers," "Fraudulent Conveyances," and Editor of "Wood on Limitations," 4th Edition. Albany, N. Y. Matthew Bender & Company. 1919. Price, $12.00 Review will follow.

HUMOR OF THE LAW.

"It would seem a flagrantly clear case," said the magistrate, adding to the burglar who had been haled before him. "What have you to say for yourself?"

"Not much, your honor. But I hope you can give me a short sentence. This is my busy season."

The lawyer had been away in the country calling upon a client, but on his return there were signs of loafing and laziness on the part of the junior clerk.

"Thomas, that typewriter has not been touched today?" snapped the man of law.

"Oh, sir!" ejaculated Thomas, "Why, I was using it only an hour ago!"

"Then," thundered the employer, "how comes it that there's a spider on the machine and that he's woven a web over the keyboard?"

"Sir," remarked the lad, "I'll tell the truth. There was a fly in the works of the machine. Rather than waste my time in entrapping the insect, sir—I—er—introduced the spider, sir." —London Tit-Bits.

At the application department of the gas office, a few days ago, a man was somewhat taken aback when the clerk said to him:

"Of course you know you will have to leave a deposit of $5."

"No," the man replied. "I didn't know that. What's that for?"

"Security against loss to the company."

"I don't think that's fair."

"But, of course, you know, we pay interest at 6 per cent."

"You pay interest at 6 per cent?"

"Oh, yes."

"That's different."

The next day the man approached another clerk at the application window and said:

"This is the place you leave deposits for meters, isn't it?"

"Yes," the clerk replied.

"At 6 per cent?"

"Exactly."

Then, to the astonishment of the clerk, the man presented a big roll of bills and remarked:

"I made a deposit of $5 here yesterday and I want to raise it to a thousand."—Youngstown Telegram.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Alteration of Instruments**—Erasure.—There is no presumption of unauthorized alteration from fact that erasure appears on the surface of the instrument itself.—Robertson v. Southwestern Co., Ark., 206 S. W. 755.

2.——Materiality.—An alteration which does not change the legal effect of an instrument is not a material alteration and does not invalidate the same.—Temple v. Harriton, Ore., 176 Pac. 430.

3. **Appearance** — Quashing Service.— Where defendant appeared specially and moved to quash service, its objection, upon hearing of motion, to amendment of plaintiff's complaint, did not constitute a general appearance, where no affirmative relief was asked thereby; such objection being in no wise inconsistent with special appearance.—Alaska Pacific Nav. Co. v. Southwark Foundry & Machine Co., Wash., 176 Pac. 357.

4. **Assignments**—Good Will.—Where seller of business sold its good will and agreed not to enter into such business in city in competition with buyer for five years, agreement was enforceable against seller by buyer's assignee, purchaser of business from her; the rights acquired not being personal to the purchaser alone, but incident to the sale of the business. —Sickles v. Laumann, Iowa, 169 N. W. 670.

5. **Bailment**—Conversion.—Where a chattel has been rendered worthless by bailee, bailor may treat it as a conversion and sue the bailee for its value.—Symphony Player Co. v. Hackstadt, Ky., 206 S. W. 803.

6. **Bankruptcy** — Contempt.— While a fact which has once been judicially determined may not be again litigated between the parties, a bankrupt against whom a turn-over order has been entered may purge himself of contempt for failure to comply therewith by showing his present inability, etc.—In re Myerson, U. S. D. C., 253 Fed. 510.

7.——Insolvency.—To entitle trustee in bankruptcy to recover preference under Federal Bankruptcy Act, § 60b, trustee must show that at time of transfer bankrupt was "insolvent," property under fair valuation being insufficient to pay debts, also that payment operated as a preference, and creditor had reasonable cause so to believe.—McAleer v. People's Bank, Ala., 80 So. 94.

8. Preference.—Before recovery can be had by a trustee in bankruptcy under Bankruptcy Law, § 60, subd. b, it must appear that person receiving a preference had a reasonable cause to believe, not only that the bankrupt was insolvent, but that he was receiving a preference.—Williams v. Davidson, Wash., 176 Pac. 334.

9. **Bills and Notes**—Presentment.—The waiving of presentment for payment, protest, and notice does not increase the original liability of the indorser, but merely renders unnecessary the performance of these acts to fix such liability.—State Nat. Bank of Ft. Worth v. Vickery, Tex., 206 S. W. 841.

10.——Set-Off.—The maker of a negotiable instrument may plead a set-off against the payee, provided the instrument has not been negotiated to a holder in due course for value.—Hanson v. Drake, Wash., 176 Pac. 349.

11. **Carriers of Goods** — Bill of Lading. — Where general agent of railroad issued exchange bill of lading for a forged bill without ascertaining whether the goods had been received, the railroad is liable to innocent third party, who, in reliance on exchange bill issued by railroad, purchased exchange bill in good faith for value, without knowledge of circumstances under which it was issued.—Chas. W. Johnson Lumber Co. v. Great Northern Ry. Co., Wash., 176 Pac. 343.

12.——Misdelivery.—Delivery of a shipment to a wrong person by a common carrier is inexcusable for any cause of fraud, imposition, or mistake, however occasioned, that would not also release the carrier from the duty of safe carriage.—Southern Ry. Co. v. Harris, Ala., 80 So. 101.

13. Carriers — Municipal Corporation.— The Legislature of a state may, unless restrained by the state Constitution, contract away its power to regulate the rates of fare of a street railroad company, either by an enactment of its own, or by delegating to the municipality the power to do so.—Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, U. S. D. C., 253 Fed. 499.

14. **Carriers of Live Stock**—Waiver.—The provision of a valid interstate live stock shipment contract that suits to recover for injury or delay to shipments must be begun within 91 days thereafter cannot be waived by a carrier.—Cudahy Packing Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex., 206 S. W. 854.

15. **Chattel Mortgages**—Crops.—As a mortgage on crops to be grown does not attach until the crop is planted and such a mortgage does

not attach to the increase of live stock until it comes into existence, a tenant cannot by giving a mortgage just before the term begins deprive his landlord of the lien on crops and other personal property, etc., given by Code, § 2992, as well as reserved by the lease.—Dilenbeck v. Security Sav. Bank, Iowa, 169 N. W. 675.

16. **Commerce**—Employe.—Plaintiff servant, injured while helping to remove from a freight car steel rails being hauled over main lines of defendant railroad running from Chicago to Omaha, and which when distributed were to be subsitituted for rails being removed, was engaged in "interstate commerce" within the federal Employers' Liability Act, § 1 (Comp. St. 1916, § 8657).—Reed v. Dickinson, Iowa, 169 N. W. 673.

17.——Rebilling Shipment.—Where a hay dealer at F., Tex., his distributing point, received by rail a carload of hay from A., N. M., and at F., Tex., rebilled the shipment to his customer at M., Tex., and prepaid the freight, the shipment under the rebilling was intrastate.—Panhandle & S. F. Ry. Co. v. Talmage, Tex., 206 S. W. 862.

18.——State Public Service Commission.—The Corporation Commission may require all reasonable and proper facilities to be furnished by a railroad, and fact that its order requiring such facilities may incidentally affect interstate commerce does not render it a nullity.—Atchison, T. & S. F. Ry. Co. v. State, Okla., 176 Pac. 393.

19. **Common Law**—Rights and Remedies.—There is a wide distinction between "common-law rights" and "common-law remedies," the former being a rule of decision and not a rule of practice; whereas, the latter is no more than a means of preservation in which no rights are vested and no preferences preserved.—State v. Superior Court of Pierce County, Wash., 176 Pac. 352.

20. **Contracts** — Gratuitous Services.— An agreement to pay for services which have been gratuitously rendered is without consideration and will not be enforced by the courts.—Kregel v. Fredelake, Iowa, 169 N. W. 642.

21.——Illegality.—Courts will not enforce a contract in violation of law, or permit a plaintiff to recover upon such a transaction, even though its invalidity is not affirmatively pleaded as defense. Hunt v. W. T. Rawleigh, Medical Co., Okla., 176 Pac. 410.

22.——Lex Loci Contractus.—The execution of a contract must be determined by the laws of the place where the contract is made.—Netherwood v. Raymer, U. S. D. C., 253 Fed. 515.

23.——Moral Obligation.—Contracts entered into or promises made on the basis of friendship and good will, unsupported by pecuniary or material benefit, create at most bare moral obligations, binding only on the conscience, and a breach thereof presents no cause for redress by courts.—Rask v. Norman, Minn., 169 N. W. 704.

24.——Performance.—Where a contract fixes no time for performance, the law allows a reasonable time, depending on the circumstances of the case.—Bush v. Merrill, Tex., 206 S. W. 834.

25. **Corporations**—Doing Business in State.—Contract by which defendant agreed to handle publications of plaintiff, foreign corporation, to exclusion of all others, held a contract for sale of goods, not within statute prohibiting a foreign corporation from "doing business" within the state wthout filing copy of articles of incorporation, etc.—Robertson v. Southwestern Co., Ark., 206 S. W. 755.

26.——Lex Loci Contractus.—The liability of a stockholder for an unpaid subscription is controlled by the laws of the state where the corporation is created and exists.—United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., Ky., 206 S. W. 806.

27. **Covenants** — Rescission.—Where defendant purchasers did not elect to rescind for breach of covenant of seisin, but the vendors acquired the outstanding title and the purchasers were not disturbed in their possession, defendants could not defeat recovery of interest on purchase-money notes accruing during the time before the vendors perfected their title, having suffered no material damages.—Rice v. Smith, Ky., 206 S. W. 784.

28. **Damages**—Exemplary.—Generally speaking, exemplary damages are never a matter of right, being primarily intended as a punishment.—Stricklen v. Pearson Const. Co., Iowa, 169 N. W. 628.

29. **Death**—Initiation Ceremonies.—In an action against a lodge for wrongful death of plaintiff's intestate caused by acts performed during his initiation, the question of negligence in the use of apparatus or manner of its operation was for the jury.—Supreme Lodge of the World, Loyal Order of Moose, v. Gustin, Ala., 80 So. 84.

30. **Deeds** — Mental Incompetency. — Mere showing that a grantor was to a great extent a pitiable physical wreck from heavy drinking, and that he was often intoxicated, was insufficient to show that at the time of making the deed he was mentally incompetent.—Casady v. Casady, Iowa, 169 N. W. 683.

31.——Registration.—In action on fire policy, deed to plaintiff for lot on which storehouse which was burned was located, where delivered before policy was issued, was admissible to show that plaintiff was the owner, although not recorded until policy was issued, since a deed is good as between the parties without registration except as against purchasers and creditors.—Proffit v. State Mutual Fire Ins. Co., N. C., 97 S. E. 635.

32. **Divorce**—Fraudulent Conveyance.—Where husband, because he apprehended that wife was to sue for divorce, conveyed land to his brother to secure him in the repayment of moneys advanced by him, the conveyance was not fraudulent.—Keohane v. Keohane, Cal., 176 Pac. 386.

33.——Extreme Cruelty.—Conduct of either spouse, grievously wounding the other's mental feelings, or so utterly destroying the other's peace of mind as to seriously impair bodily health, or utterly destroying legitimate end of matrimony, is "extreme cruelty," within Rev. Laws 1910, § 4962.—Robertson v. Robertson, Okla., 176 Pac. 387.

34. **Easements**—Dominant Estate.—Existing easement passes by a conveyance of the dominant estate, and hence wall and sewer easements passed by a mortgage of that estate and its foreclosure, and by subsequent transfers: "appurtenances," as used in mortgage habendum clause, being an apt term for conveying an easement, though not necessary to transfer an existing appurtenant easement.—Leuthold v. John A. Stees Co., Minn., 169 N. W. 709.

35. **Equity**—Laches.—As a matter of public policy, antiquated demands will not be considered by the courts, and, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into.—Scott v. Scott, Ala., 80 So. 82.

36. **Eminent Domain**—Public Use.—The state has inherent power to take private property required for public use wherever it may be located, and in the taking may act directly or through a local agency authorized to exercise its power in whole or in part, and may authorize the city council to exercise such power to acquire property for the city.—In re City of Rochester, N. Y., 121 N. E. 102, 224 N. Y. 386.

37.——Public Use.—A railroad being a quasi public corporation and subject to legislative control and supervision, the condemnation of lands for rights of way, etc., is a condemnation for "public use."—Howard Realty Co. v. Paducah & I. R. Co., Ky., 206 S. W. 774.

38. **Executors and Administrators**—Compromises.—An executor has authority to compromise contested or doubtful claims for or against the estate.—Home Mixture Guano Co. v. Woolfolk, Ga., 97 S. E. 637.

39. **Fixtures**—Intent.—If a tenant intended permanently to annex additions to a building, such additions will not be regarded as trade fixtures, but a part of the realty.—Winnike v. Heyman, Iowa, 169 N. W. 631.

40.——Removability.—A mortgage upon premises on which an ice plant was placed will not

attach to the plant and equipment, unless the machinery was so attached that it could not be moved without injuring the realty.—United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., Ky., 206 S. W. 806.

41. **Forgery**—Defined.—"Forgery" is an attempt to defraud a person of his property, whether real or personal, by the making of a false or fraudulent written instrument of title, or a false evidence of indebtedness, and the like.—State v. McCray, Okla., 176 Pac. 418.

42. **Gifts** — Symbolical Delivery. — Where mother gave a key to a strong box to certain person, with directions to hand it to defendant, and while on her deathbed told defendant, "All that box contains is yours," whereupon defendant pulled the box out of its place and shoved it back again, but remained in the room until the death of the mother, receiving the key the next day from the third person, there was an executed gift, of a deposit in the bank, evidenced by a bank book in the strong box.—Allen v. Smith, Cal., 176 Pac. 365.

43.——Promise to Make.—A promise to make a gift inter vivos will not vest any right or title in the donee, except where the promise is followed by performance, and a surrender of possession or dominion over the alleged subject of the gift.—Casady v. Casady, Iowa, 169 N. W. 683.

44.—Irrevocability.—If one to whom another has rendered services voluntarily gives and turns over to such other money or property as an evidence of gratitude or appreciation, such payment or gift is irrevocable and the title of the donee is good against the world, in the absence of fraud.—Kregel v. Fredelake, Iowa, 169 N. W. 642.

45. **Highways**—Governmental Function.—The building of a public road by county commissioners is a governmental function, as distinguished from a business function, of the commissioners. —Moore v. Luzerne County, Pa., 105 Atl. 94.

46. **Husband and Wife**—Agency.—A husband may act as agent for his wife and bind her by note.—Roper v. Cannel City Oil Co., Ind., 121 N. E. 96.

47.——Parental Advice.—A parent may advise his son in good faith to leave his wife and procure a divorce, if statutory grounds for separation or divorce exist or he has reasonable cause to believe and does believe that they do exist. —Melcher v. Melcher, Neb., 169 N. W. 720.

48. **Injunction**—Certiorari.—The application to enjoin a municipal township from enforcing an invalid resolution excluding from circulation therein a newspaper printed in the German language, is within the jurisdiction of a court of equity, since review by certiorari is clearly inadequate.—New Yorker Staats-Zeitung v. Nolan, N. J., 105 Atl. 72.

49.——Contempt.—In an application to punish for contempt for disobedience of an injunctive order against use of a trade-name, it is not necessary that there be proof of actual confusion as to the names in the mind of the public.—Hilton v. Hilton, N. J., 105 Atl. 65.

50.——Marriage by Minor.—If a minor is of the age of consent, that there was no license, or that it was wrongfully obtained, does not invalidate his marriage.—Melcher v. Melcher, Neb., 169 N. W. 720.

51.——Personal Rights.—The relation between capital and labor cannot be controlled, nor regulated by any injunction; but an injunction may issue when property or personal rights are unlawfully assailed.—State v. Employers of Labor, Neb., 169 N. W. 717.

52. **Insurance**—Collateral Security.—Where insured assigns his life insurance as collateral security, the duty to keep the collateral in force by payment of premiums rests on him, in the absence of an agreement to the contrary.—Stratton v. Bankers' Life Co. of Des Moines, Iowa, Neb., 169 N. W. 722.

53.——Forfeiture.—The construction of an insurance policy provision that the policy shall be void, if insured building be on ground not owned by the insured in fee, as relating to date of policy's issue, being reasonable, should be adopted to avoid the never-favored forfeiture. Insurance Co. of North America v. O'Bannon, Tex., 206 S. W. 814.

54.——Initiating Members.—A regularly chartered subordinate lodge in taking in and initiating candidates into its membership was acting as the agent of the Supreme Lodge.—Supreme Lodge of the World, Loyal Order of Moose, v. Gustin, Ala., 80 So. 84.

55.——Reliance on Representations. — Where applicant for fire insurance made representations false to knowledge of insurer's agent, and insurer believed representations and relied thereon in issuing policy, and sustained damages in consequence, cause of action against agent was complete.—St. Paul Fire & Marine Ins. Co. v. Laubenstein, Wis., 169 N. W. 613.

56.——Waiver.—Where insured, a year after discovering that an agent of an insurance company had fraudulently stated the kind of policy he was to receive, paid another premium, he thereby waived the fraud and elected to continue the insurance upon the terms stated in the policy.—Arndt v. Jefferson, Standard Life Ins. Co., N. C., 97 S. E. 631.

57. **Limitation of Actions**—Mutual Account. —A "running and mutual account is one growing out of reciprocal dealings between the parties, in which each extends credit to the other with the understanding that on adjustment had the items supplied and charged shall be allowed as proper credits.—Hollingsworth v. Allen, N. C., 97 S. E. 625.

58.——Pendency of Suit.—Where plaintiff was restrained by injunction from prosecuting her suit, brought in seasonable time, for wrongful death of her husband, Ky. St. § 2544, saves the cause of action from being barred by limitation during the pendency of the injunction.—Reed's Adm'x v. Illinois Cent. R. Co., Ky., 206 S. W. 794.

59.——Public Policy.—In suit by wife against her husband to protect her property, statutes of limitations or estoppels by lapse of time ordinarily do not affect her rights, as on grounds of public policy she cannot be expected to treat her husband as a stranger; Act April 22, 1856, § 6, not applying.—Morrish v. Morrish, Pa., 105 Atl. 83.

60. **Master and Servant**—Assumption of Risk. —Where the mine operator had discharged all common-law and statutory obligations to deceased, but the work was such that the danger of falling rock remained, deceased assumed the risk; the master not being negligent.—Snapp v. Steinbaugh, Ind., 121 N. E. 81.

61.——Assumption of Risk.—A servant assumes all the risks which he is capable of appreciating, remaining after master has exercised reasonable care for his safety.—Louisville N. R. Co. v. Wright, Ala., 70 So. 93.

62.——Employe.—The general rule is that a master is entitled to the servant's earnings during the time which, under his contract, he is to devote to the discharge of his duties, except so far as the rights of the parties are modified by an express or implied agreement.—Bryden v. Delaware, L. & W. R. Co., Pa., 105 Atl. 79.

63.——Momentary Negligence.—Owner of automobile is not liable for damages for torts of an adult person in possession and management of it on the mere ground of owner's presence, when such experienced person was momentarily negligent in driving.—Zeeb v. Bahnmaier, Kan., 176 Pac. 326.

64.——Safe Place to Work.—It is the duty of a master to use reasonable care to provide servants a reasonably safe place to work.—Wangen v. Upper Iowa Power Co., Iowa, 169 N. W. 668.

65.——Scope of Employment.—A master, having given its superintendent general power to maintain discipline within the bounds of his own discretion, is liable for an abuse of that power by assault on an employe within the course or scope of his employment.—De Leon v. Doyhof Fish Products Co., Wash., 176 Pac. 355.

66. **Mechanic's Liens**—Statement of Claim.— Mechanic's lien statute rests on principle that one furnishing labor or material for improvement of property is entitled to look to that property for compensation, and a materialman, claiming a lien, must ordinarily show that ma-

terial was furnished for and actually used in erection or repair of building against which lien is asserted.—Moore & Richter Lumber Co. v. Scheid, Ind., 121 N. E. 91.

67. **Monopolies**—Labor Union.—Employers of labor and workingmen have equal rights to form organizations for their own benefit, and, in absence of contract for a fixed term, the employer may discharge the employe, or the employer may quit, at his own pleasure.—State v. Employers of Labor, Neb., 169 N. W. 717.

68.——Restraint of Trade.—A manufacturer's contract of absolute sale of its preparations, whereby purchaser agrees to sell all preparations at retail prices to be fixed by manufacturer, whose entire product is sold throughout the country under like restrictions, is a "restraint of trade," unlawful, as to interstate commerce, under Act of July 2, 1890.—Hunt v. W. T. Rawleigh Medical Co., Okla., 176 Pac. 410.

69. **Municipal Corporations**—Burden of Proof.—Automobile collision having occurred at point where plaintiff was on wrong side of street, burden was on plaintiff to show that his presence there was consistent with ordinary care.—Giese v. Kimball, Iowa, 169 N. W. 639.

70.——Closed Street.—A municipality may entirely close a street while repairs are going on, and, if the closed condition is properly indicated, etc., there is no liability for injuries to one using it.—Knepfle v. Lauffer, Ky., 206 S. W. 788.

71.——Shifting Burden.—One who in broad daylight drives into the rear of a vehicle standing still on a public street is guilty of negligence, unless he can show the collision was due to circumstances beyond his control.—Southern Express Co. v. Southard, Ky., 206 S. W. 773.

72. **Negligence**—Probable Consequences.—Negligence does not entail a liability for every possible consequence that may ensue from the facts of its existence, but only from its natural and probable consequences.—Stowers v. Dwight Mfg. Co., Ala., 80 So. 90.

73.——Res Ipsa Loquitur.—The fact that doctrine of res ipsa loquitur is applicable does not relieve plaintiff of ultimate burden to prove defendant's negligence, though it permits the jury to infer negligence and find on all evidence whether plaintiff has sustained burden.—Onell v. Chappell, Cal., 176 Pac. 370.

74. **Nuisance**—Injunction.—Where defendants were attempting to erect a private garage in direct violation of their permit, that of itself was sufficient to warrant a temporary injunction, until the issues involved in the action should be tried.—Trapernicht v. Richter, Minn., 169 N. W. 701.

75. **Parent and Child**—Tort by Child.—A father is not liable in damages for the torts of his adult son on the mere ground of paternity.—Zeeb v. Bahnmaier, Kan., 176 Pac. 326.

76. **Partnership**—Individual Debt.—One partner cannot pass the title to partnership property by appropriating it to the payment of his individual debt.—Jones v. Nichols, Ala., 80 So. 71.

77. **Payment**—Application of.—Generally, in absence of stipulation to the contrary, credits upon a running account are to be applied to the first items of account.—Ady & Crowe Mercantile Co. v. Howard, Col., 176 Pac. 328.

78. **Principal and Agent**—Circumstantial Evidence.—The relation of principal and agent may be shown by circumstantial evidence alone.—Roper v. Cannel City Oil Co., Ind., 121 N. E. 96.

79. **Principal and Surety**—Strict Construction.—Surety contracts will be strictly construed, merely that the obligation of the surety shall not be extended by implication or presumption, and not to relieve the surety from an onerous condition or obligation.—Bank of Ft. Worth v. Vickery, Tex., 206 S. W. 841.

80.——Uncollected Judgment.—An uncollected judgment against the principal on a note does not estop payee holder from proceeding against other signers where they may have been liable as sureties.—Schuling v. Ervin, Iowa, 169 N. W. 686.

81. **Quieting Title**—Cloud on Title.—Where a bill to quiet title alleges that a tax deed is of record and, though void, casts a cloud on the title of complainant, it is sufficient to show that respondent has a title that is a cloud on complainant's title, and it need not be alleged that the title is fair on its face.—Downing v. Carlton, Fla., 80 So. 57.

82. **Railroads**—Crossing.—It is the duty of one about to cross an unusually dangerous crossing, owing to obstruction of view, to use increased care commensurate with the danger.—Louisville & N. R. Co. v. Locker's Adm'rs, Ky., 206 S. W. 780.

83.——Lien.—A recorded mortgage does not become a lien on property mortgaged until the money or consideration has been actually received by the mortgagor; so the mere recording of a mortgage given by a railroad company to secure bonds did not create a lien superior to contractor's mechanics' liens.—Sanders v. Southern Traction Co. of Illinois, U. S. D. C., 253 Fed. 511.

84.——Negligence.—When danger from another's operation of a vehicle at a crossing is manifest to passenger therein who has adequate opportunity to control the situation, but who, without protest, permits himself to be driven to his injury, instead of directing that the vehicle be stopped, his negligence will bar a recovery.—Azinger v. Pennsylvania R. Co., Pa., 105 Atl. 87.

85. **Receiving Stolen Goods**—Concealment.—Defendant, who received jewelry without knowing it was stolen, but, after learning the fact, concealed it, was guilty of receiving stolen property.—Falcone v. State, Tex., 206 S. W. 845.

86. **Removal of Causes**—Diversity of Citizenship.—A petition for removal of a cause from a state to a federal court, on the ground of diversity of citizenship, made after trial, in the absence of fraud, collusion, or inequitable conduct, came too late.—Supreme Lodge of the World, Loyal Order of Moose, v. Gustin, Ala., 80 So. 84.

87. **Sales**—Rescission.—Where contract of sale of a truck is rescinded by mutual consent of buyer and seller, and seller takes back truck and resells it, and buyer relinquishes everything received under contract, buyer is entitled to the restoration of money paid and return of promissory notes.—Smith v. F. L. Moore Truck Co., Cal., 176 Pac. 367.

88.——Rescission.—When seller wrongfully attempted to rescind, having elected by acceptance of a payment after buyer's default to consider contract still in force, buyer had the right to assent to such rescission, thereby accomplishing it by mutual consent.—Massey v. Becker, Ore., 176 Pac. 425.

89.——Severable Transaction.—Where defendant by false and fraudulent representations that a farm contained a certain acreage and was free from floods, induced plaintiff to enter written lease for a term, and to accept bill of sale of live stock, etc., on farm, the transaction was severable, so that plaintiff, could, after knowledge of fraud, rescind one contract and ratify the other.—Przyblyski v. Pellowski, Minn., 169 N. W. 707.

90. **Telegraphs and Telephones**—Misspelling Name.—Misspelling by sender of telegram of name of addressee, though resulting in delay in delivery, does not prevent recovery, if by exercise of ordinary care the company, after learning the correct name, could have delivered in time to prevent the injury; it not being a proximate cause.—Parham v. Western Union Telegraph Co., Tex., 206 S. W. 839.

91. **Vendor and Purchaser**—Forged Deed.—A forged deed is void, and, though recorded in due form, is ineffective as a muniment of title even as to subsequent purchasers in good faith for value without notice.—Baldridge v. Sunday, Okla., 176 Pac. 404.

92. **Wills**—Intent.—The intention of the testator is the controlling consideration in the construction of a will, and must be gathered from the will itself.—Bellamy v. Bellamy, Iowa, 169 N. W. 621.